



Federal Communications Commission
Washington, D.C. 20554

DA 05-1551
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Mr. Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, MD 21705-0113

Re: Copeland Channel 21, LLC
New NTSC Television Station
Channel 21, Virginia Beach, VA
File No. BPCT-19960614KI
Fac ID: 82574

Dear Mr. Colby:

This letter concerns the above-referenced application of Copeland Channel 21, LLC (Copeland) for a new NTSC television station on Channel 21, Virginia Beach, Virginia.¹ Copeland received its construction permit for the new Virginia Beach station through auction.² WBOC, Inc., licensee of station WBOC-TV, Channel 16, and WBOC-DT, Channel 21, Salisbury, Maryland, filed petitions to deny Copeland's application.³

Background. WBOC states that it has been operating its NTSC station in Salisbury, Maryland since 1954. The station completed its DTV facilities and began transmitting DTV programming in 2001. WBOC claims that in April 2002 its NTSC station on Channel 16 began receiving "severe reception problems" throughout its coverage area. WBOC claims that the source of this

¹ The application was originally filed by Robert O. Copeland and was later amended to submit a limited liability company controlled 100% by Mr. Copeland.

² See *Winstar Broadcasting Corp.*, FCC 05-19, released January 27, 2005. In that decision, the Commission instructed Copeland to submit a statement accepting or rejecting the offer of the construction permit at Copeland's final bid amount no later than March 1, 2005. Copeland submitted a statement accepting the offer. The Commission also instructed Copeland to pay its final bid amount by no later than April 1, 2005. Copeland timely paid its final bid amount.

³ On August 9, 2002, WBOC filed a "Petition to Deny, Motion to Suspend Processing and Motion for Waiver of Filing Deadline and Consideration of Petition as Timely Filed." After Copeland's application was formerly accepted for filing, WBOC filed a "Petition to Deny or in the Alternative to Grant the Application Subject to Specific Conditions." Also before the Commission, are numerous responsive pleadings submitted by the parties from 2002 to date.

interference was WHRO-DT, Channel 16, Hampton Roads, Virginia. WBOC claims that its engineers attributed the problem to “ducting” - a phenomenon which enables broadcast signals to carry significantly longer distances over bodies of water than normally would be expected. WBOC filed a request asking that the Commission eliminate the purported interference to its NTSC station.

In its 2002 filing, WBOC argues that its DTV station on Channel 21 will experience the same type of ducting interference from Copeland’s new NTSC facility on Channel 21 at Virginia Beach. WBOC argues that Copeland’s station is in “virtually the same geographic position in relation to WBOC-TV as is WHRO-DT.” Therefore, WBOC maintains, it is “reasonable to extrapolate from the engineering data collected” from the WBOC-TV and WHRO-DT case to conclude that the “unique propagation characteristics between Salisbury and Norfolk markets could well cause interference to co-channel facilities operating on Channel 21.”

In its 2005 filing, WBOC submitted an engineering study that it claims to show that Copeland’s NTSC operation on Channel 21 would cause “some interference, analog to digital, to WBOC-DT, based on conventional prediction methodologies.” WBOC argues that Copeland should be limited to operating with only 1 megawatt of power (as opposed to the 5 megawatts sought by Copeland) and that such a limitation would “substantially reduce” the risk of interference. WBOC claims that a 1 megawatt facility would “reach more than 90% of the viewers” that Copeland would reach with a 5 megawatt facility. WBOC also claims that Copeland’s 5 megawatt facility will cause harmful interference to WUND-DT, Channel 20, Columbia, North Carolina, and WRIC-DT, Channel 20, Petersburg, Virginia. Finally, WBOC submitted a filing in January 2003 purporting to show other channels that could be used for Copeland’s future digital operations.

In his 2002 opposition, Copeland argues that the allocation study submitted with the April 2002 amendment to its application shows its facility “fully protects all DTV authorizations and allotments.” This conclusion, Copeland states, was based upon Longley-Rice projections and the guidelines set forth in the Commission’s Public Notice of August 10, 1998. Copeland argues that WBOC had failed to show that there is any likelihood that ducting interference will exist. Copeland argues that “unless and until the laws of physics are changed, the reception of a DTV signal will always require the use of a fairly directional receiving antenna pointed right at the DTV station. Thus, even if ducting conditions might temporarily raise the strength of an undesirable signal on the same channel, it is extremely unlikely that DTV receivers would be adversely affected in any way.” Copeland points out that there have been no reports of interference from WBOC-TV to the co-channel DTV operations of WHRO-DT.

In his 2005 opposition, Copeland argues that: “the fact that the digital operation of a station in Norfolk caused ducting interference to an analog station in Salisbury is by no means predictive that Copeland’s proposed analog operations in the Norfolk area will cause ducting interference, or any other kind of interference to WBOC’s digital operations on Channel 21 at Salisbury.” Copeland argues that “the digital signal is much more robust than an analog signal, and much more resistant to interference.”

1. *Discussion.* Under the Communications Act, parties challenging an application by means of a petition to deny under Section 309(d) of the Communications Act must satisfy a two-step test.⁴ First, the petition to deny must set forth “specific allegations of fact sufficient to show that . . . a grant of the application would be *prima facie* inconsistent with [the public interest].”⁵ Second, the petition must present a “substantial and material question of fact” concerning whether the grant of the application would serve the public interest.⁶ If the Commission concludes that the protesting party has met both prongs of the test, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest the Commission must formally designate the application for a hearing in accordance with Section 309(e) of the Communications Act.⁷

2. To satisfy the first prong of the test, a petitioning party must set forth allegations, supported by affidavit, that constitute “specific evidentiary facts, not ultimate conclusionary facts or mere general allegations . . .”⁸ The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge’s consideration of a motion for directed verdict: “if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.”⁹

3. If the Commission determines that a petitioner has satisfied the threshold standard of alleging a *prima facie* inconsistency with the public interest, it must then proceed to the second phase of the inquiry and determine whether, “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has presented a “substantial and material question of fact.”¹⁰ If the Commission concludes that the “totality of the evidence arouses a sufficient doubt” as to whether grant of the application would serve the public interest, the Commission must designate the application for hearing pursuant to section 309(e).¹¹

For the reasons set forth below, we find that WBOC has failed to demonstrate that grant of Copeland’s application for a new NTCS television station would be inconsistent with the public

⁴ 47 U.S.C. § 309(d).

⁵ 47 U.S.C. § 309(d)(1); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987)(*Gencom*); and *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988)(*Astroline*).

⁶ 47 U.S.C. § 309(d)(2); *Gencom*, 832 F.2d at 181; and *Astroline*, 857 F.2d at 1562.

⁷ 47 U.S.C. § 309(e).

⁸ *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir.1980) (*en banc*) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Circuit 1974)).

⁹ *Gencom*, 832 F.2d at 181.

¹⁰ 47 U.S.C. § 309(d)(2); *see also Gencom*, 832 F.2d at 181.

¹¹ *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (quoting *Citizens for Jazz on WRVR Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)).

interest. We are not persuaded by WBOC's speculative engineering showings that "ducting" interference may occur in this case to the extent that Copeland's analog operations will cause harmful interference to WBOC's DTV operations. Ducting is a weather-related phenomenon and may be highly variable in both direction and intensity. We recognize that the highly variable phenomenon of ducting may occur near or over water. The evidence presented by WBOC to support its contention that ducting is likely to occur here, however, is not persuasive or probative. The Commission has not made a determination concerning the alleged ducting interference between WHRO-DT and WBOC-TV. Furthermore, WBOC-DT's digital signal is much more robust than its analog signal, and should be more resistant to impermissible interference from an analog station. Finally, we find that Copeland's analog operation complies fully with the Commission's technical rules including the interference protection requirements.¹²

Furthermore, should impermissible interference actually occur upon the initiation of service by Copeland's NTSC station, the Commission has at its disposal a number of different options to which it may avail itself in conjunction with the DTV channel election process.¹³ These include proposing to change the channels for either WBOC's or Copeland's stations or both. It would be premature to condition Copeland's construction permit in the absence of a proven interference problem. Any such condition would be pure speculation without technical support.

The above facts considered, we find Copeland fully qualified and that grant of its application will serve the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, That WBOC, Inc.'s Petition to Deny, Motion to Suspend Processing and Motion for Waiver of Filing Deadline and Consideration of Petition as Timely Filed, and Petition to Deny or in the Alternative to Grant the Application Subject to Specific Conditions ARE DENIED.

IT IS FURTHER ORDERED, That the application of Copeland Channel 21, LLC, for a construction permit for a new NTSC television station on Channel 21, Virginia Beach, Virginia (File No. BPCT-19960614KI) IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹² In the engineering portion of its application, Copeland claimed that its proposal would not provide the requisite 100% City Grade coverage required by the Commission's rules. Our analysis, however, confirms that 100% City Grade coverage will be provided with the facilities proposed in Copeland's application.

¹³ See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Report and Order*, 19 FCC Rcd 18279 (2004).

cc: Jonathan D. Blake, Esq. – Counsel for WBOC, Inc.